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THE REVISED PENAL CODE OF PENNSYLVANIA.

1. *Report of the Commissioners appointed to revise the Penal Code of the Commonwealth of Pennsylvania, January* 4, 1860. Harrisburg: A. BOYD HAMILTON, State Printer. 1860. pp. 129.
2. *The Penal Laws of Pennsylvania, passed March* 31, 1860. Harrisburg: A. BOYD HAMILTON, State Printer. 1860. pp. 79.

The Legislature of Pennsylvania, on the nineteenth of April, 1858, passed the following resolutions:—

1. "That the Governor of this Commonwealth be and he is hereby authorized and required to appoint, by and with the advice and consent of the Senate, three competent citizens, learned in the laws of this commonwealth, as commissioners to revise, collate and digest all the acts and statutes relating to or touching the penal laws of the commonwealth.

2. "That it shall be the duty of the said commissioners carefully to collect, and reduce into one act, all acts and statutes, and parts of acts and statutes, relating to or touching the penal laws of the commonwealth, and arrange the same systematically, under proper titles, divisions and sections; to omit in such revision all acts, and parts of acts, that have been repealed or supplied by subsequent acts, or which have expired; to suggest to the legislature any contradictions, omissions, defects or imperfections that may appear in the acts and statutes to be revised, and the mode in which the same may be reconciled, supplied, improved or amended; to designate such acts or statutes, or parts of acts or statutes as ought to be repealed, and to prepare and submit to the legislature new acts or statutes, as such repeal may render advisable or necessary; and, generally, it shall be the duty of the said commissioners to execute the trust confided to them in such a manner as to render the penal code of Pennsylvania more efficient, clear and perfect, and the punishment

inflicted on crimes and misdemeanors more uniform and better adapted to the suppression of crime and reformation of the offender: *Provided nevertheless*, That in the revision of the penal acts and statutes of the commonwealth, that in any proposed change in the phraseology thereof, the said change shall be clearly and distinctly set forth, together with the acts or statutes proposed to be altered or amended.

3. "That it shall be the further duty of the said commissioners to report whether any, and if any, what changes in the modes and forms of proceeding in the administration of the penal laws of the commonwealth, or in the mode of selecting and summoning juries in criminal cases, would be advantageous or judicious."

Under these resolutions, the Governor appointed the Hon. Ellis Lewis, Hon. John C. Knox, and David Webster Esq., Commissioners. The Hon. Ellis Lewis resigned after holding the appointment for a short time, and the Hon. Edward King was appointed in his place. The result of the labors of the three gentlemen who acted upon the Commission, is set forth in the first of the pamphlets, whose titles are placed at the head of this article. The second pamphlet above named contains the final action of the Legislature upon the report, and shows a merited appreciation and approval of the manner in which the duty entrusted to the Commissioners has been discharged, in the enactment with but few exceptions and alterations, of the laws proposed for its consideration.

No one can deny that the Governor made a most judicious and discriminating choice in the selection of the Commissioners, to whom was to be entrusted the difficult and important duty of so modifying, arranging and improving the penal legislation of the commonwealth, as to render it "more efficient, clear and perfect, and the punishment inflicted more uniform and better adapted to the suppression of crime and reformation of the offender." Judge King, for many years President Judge of the court having criminal jurisdiction in the City and County of Philadelphia, brought to the work an extensive legal knowledge, a mature judgment, and long and varied experience upon the bench of a criminal court. Judge Knox, formerly President Judge of the tenth and eighteenth Judicial Districts, more recently an associate justice of the Supreme Court, and at the time of his appointment Attorney General of the State, is a ripe and accomplished lawyer, with a most fortunate blending of the practical and philosophical elements in his mental composition. Mr.

Webster, a well-read lawyer, of accurate and well-disciplined habits of thought, industrious and careful, enjoyed the advantage of having served with great credit for several years as assistant, and afterwards as sole prosecuting attorney in Philadelphia. These three gentlemen have with promptness, faithfulness, and painstaking and careful accuracy and judgment performed their allotted duty. The results of their labors we propose briefly to examine.

It is important to bear in mind from the outset, the terms of the resolutions under which the Commissioners were appointed. As is justly observed in the "report" they do not "contemplate a *codification* of the criminal law." However beautiful, and logically exact a system may be formed by a mere theorist, yet it must be evident to any one who will even cursorily look over the "Penal Codes" which have from time to time been constructed and enacted in Europe and in this country, that they fall far short of the necessary requisite of a practical adaptation to the wants of the people and the spirit of our institutions. The whole subject of punishment, its means and the ends to be accomplished, is not, and probably never will be, definitely settled so as to admit of the construction of a penal code whose perfection shall be universally acknowledged. It is true the second resolution of the Legislature specifies certain ends to be attained, among which are "the suppression of crime and reformation of the offender." But the relative importance of these ends, and the adaptation and proper harmonizing of the means to be used for the attainment of all the desired results, admit of a wide field of discussion and very great diversity of opinion. In whatever elements real perfection of a penal code may ultimately be determined to consist, the Commissioners have wisely recognized the judiciousness of the terms in which the resolutions are framed, as tending to a more certain accomplishment of so desirable a result:—

"The common law definitions of crimes are so clear, perspicuous, and precise; the modes of proof, rules of evidence, and manner of procedure in criminal investigation so well settled and known, that it is doubtful if they could be improved by the most skillful codification. In the common law code of crimes and criminal procedure, and in judicious and well considered statutes extending or modifying its operations, so as to embrace new social emergencies as they arise, will be found an approximation to a perfect penal code. Gradual, it is true, in its progress, *but more*

certain and permanent, than any attempt to strike out such a system at a single heat could possibly be." Report p. 3.

The Commissioners therefore prepared and submitted to the Legislature two bills or acts, viz: No. 1, entitled "An act to consolidate, revise and amend the penal laws of this commonwealth;" and No. 2, entitled "An act to consolidate, revise and amend the laws of this commonwealth relating to criminal procedure and pleading."

However perfect may have been the bills reported as embodying the final conclusions of the Commissioners as to the necessary enactments for perfecting the penal code; their labors it is to be feared would have been of little practical benefit or avail, had they not accompanied the bills with so full and elaborate explanations of their relations to the existing legislation, the changes and modifications proposed, and the reasons which led to the conclusions adopted, as to enable the Legislature almost at a glance as it were to clearly comprehend the effects of any action they might take upon the proposed revision. For the determination of the Commissioners was not final; every sentence, paragraph and section, as well as the whole body of the bills, had to be submitted to the scrutiny of the Legislature, for their adoption or rejection. With this in view, the report of the Commissioners is greatly to be commended for its clearness, method, and minuteness, without diffusiveness, of explanation and comment. With accurate and full references to the pages and sections of the Pamphlet Laws and Digest, containing the existing enactments,—brief statements of the mere re-enactments of laws already in force,—clear and terse explanations of modifications or amendments,—careful pointing out of any new provisions, with the reasons for their introduction briefly yet luminously set forth; the Legislature had the entire subject presented to their view in a business-like, condensed and quickly-comprehended form for their action.

At the same time, certain general principles were determined upon by the Commissioners, which pervaded the whole tenor of their proposed legislation, and needed to be fully understood in order to a just appreciation of the entire scope of their suggestions. These principles are set forth in the report, and are deserving of a very

careful consideration, not only in a theoretical point of view for the determination of their propriety as elements governing the formation of a penal code; but also in the practical administration of criminal justice, so far as they have been actually adopted and incorporated into the penal legislation of our commonwealth:—

"No penal provision has been introduced, which is not general in its application to the whole commonwealth. Local penal laws, framed to meet special social conditions, or referring to particular local institutions, have been left untouched.

"There are also various provisions found in the election, health and poor laws, in the county and township laws, auction laws and inspection laws, in the license laws, laws regulating inns and taverns, and in the laws for the suppression of vice and immorality, and acts against horse-racing, which have only been partially disturbed. As these penal provisions are so intimately interwoven with the respective systems of which they form part, as not to be dislocated therefrom, without deranging the harmonious unity of the whole law, and as they generally consist of pecuniary penalties, recoverable by action, it has not been deemed advisable to introduce them into the code of crimes and punishments properly so called. The commissioners have, however, considered that the grave character of embezzlement of public funds by public fiscal agents, the bribery and corruption of electors, and the counterfeiting public brands required an exception to be made to this rule." Report p. 5.

These suggestions commend themselves at once by their manifest propriety in view of the language of the resolutions under which the Commissioners were appointed, and the somewhat limited scope of their action; the suggestions were approved by the Legislature, and the provisions reported in accordance with the last sentence of the above quoted paragraph, adopted and enacted.

A most important principle adopted by the Commissioners in the affxing of punishments to various crimes, is set forth in the following extract from their report; the length of which is fully justified by the importance of the principle:—

"It will be perceived that in prescribing the punishment of the various crimes, the *maximum* amount to be inflicted has only been defined; the principle found in some codes, that upon conviction, a certain *minimum* amount of punishment shall under any state of circumstances, be imposed on the culprit, being entirely excluded. A broad discretion being thus given to the courts, in order that the extent of punishment imposed should in every case bear a due relation to the relative enormity of the offence. It is this enlightened and humane principle which distinguishes modern criminal jurisprudence from the system of blind and indiscriminate severity, which it has happily superseded. A system which seemed to regard a criminal as

a noxious excresence on society, to be ruthlessly extirpated, rather than as a diseased member, to be rendered, if possible whole. In all modern penal legislation the truth of this principle has been admitted, but in its mode of application there has been much variance. In some, a maximum extent of punishment has been prescribed by the lawgiver, leaving its modification to the intelligent and experienced discretion of the criminal tribunals. In others, a maximum and minimum extent of punishment have been provided, greater or less than which, the tribunals are forbidden to inflict under any possible state of circumstances. In some, the extent of punishment, within certain prescribed limits, is referred to the discretion of the jury by whose verdict the criminal has been convicted. In others, crimes have been divided into degrees, more or less minute, to which graduated punishments have been assigned, and the jury trying the offender have been required, in the event of his conviction, to determine the degree of his guilt. * * * * In all these systems, the leading object of the lawgivers has been to produce a harmonious relation between the real magnitude of the crime and the severity of its punishment; the difference between them being only as to the most effective means of accomplishing an object equally desired by all.

"Amongst them, the commissioners give the decided preference to that which simply determines the maximum punishment to be inflicted on the crime, leaving all intermediate degrees of punishment to be determined by the criminal tribunals, according to the greater or less atrocity of the circumstances attending the commission of the crime. That such an important discretionary authority would be more steadily, uniformly, and consistently exercised by an upright, learned, responsible, and experienced tribunal, than by a jury, is a proposition not likely to be disputed by any one familiar with judicial proceedings.

"The duty of a criminal judge is not simply to punish an offender within the limits prescribed by law, but it is equally his duty to graduate the punishment according to the criminal capacity, general intelligence, past conduct and character of the culprit, and the aggravating or extenuating circumstances of each particular case. All positive and arbitrary minimum punishments necessarily interfere with the free and full exercise of this judicial duty, and should find no place in a truly philosophical code of crimes and punishments. Besides, minimum punishments do but restrain judicial mercy, whilst, within the maximum limit fixed by law, judicial severity is left without control. All the members of this commission have been, more or less, extensively engaged in the administration of criminal justice. The principle advocated is not, therefore, with them an abstract and untried theory, but the conviction of long experience and observation in actual criminal administration." Report, pp. 5, 6, 7.

Absolute certainty and impartiality in the adaptation of punishment in its duration and severity, to the actual degree of guilt and heinousness of offence, is, we may safely assert, a human impossibility. Theoretically, it may, perhaps, be laid down, that to an absolutely perfect judge, an entire and uncontrolled discretion

might safely be entrusted, not only as to the degree, but also as to the kind of punishment to be inflicted upon each offender. Were the secret recesses of each human heart, whose possessor should stand before him as a criminal awaiting sentence, open and revealed to the piercing insight of such a judge, it may well be conceived how infinitely varied might be the punishments to which he would condemn transgressors. But whatever some theorists may hold as to the perfection, or possibility of perfection, in the human race, or any of its members,—practically in all the relations and transactions of life, every man is regarded as fallible. Human fallibility and imperfection enter as controlling elements into all legislation. There must, therefore, in all criminal legislation, be something more than a mere skeleton form and machinery for the administration of criminal justice. Controlling rules, systematized and generalized in the best light afforded by all the experience and observation which can be gathered from every quarter, must regulate individual judgments liable to be swayed by a thousand diverse influences, prejudices, and passions. It were impossible to prescribe rules of inflexible absoluteness to meet every possible case, with even proximate exactness. To concede to any human mind, or to any association of human minds, the possibility of such an attainment, would be to concede the possibility at least of human perfection. Discretion, within certain limits, must be allowed; with whom such discretion should be lodged,—how these limits shall be marked out and defined,—are serious questions for the legislator.

Whatever conclusion is reached, embarrassing difficulties must present themselves. There are in this Commonwealth twenty-six judicial districts, in each of which a different judge presides over the respective criminal courts; and whatever degree or limit of discretion is entrusted by the penal code to the judge as a component part of the criminal tribunal, must be exercised in each one of these judicial districts by a distinct mind. With the utmost faithfulness and conscientiousness on the part of the judiciary, (and we may safely assert that not only in these respects, but in learning and ability, the judiciary of this Commonwealth are at least equal to any similar body of men,) there must of necessity arise great inequality of sentences.

The inspectors of the Massachusetts State Prison, in their Annual Report of 1859, remark upon this very topic, as exemplified in the experience of that institution, as follows:—

"*It is common* for prisoners to be sent here—some for double or treble the term awarded to others, yet all convicted of the same offence, and with many mitigating facts that exist indisputably in favor of those most heavily sentenced."

And they give some most glaring instances of this inequality. They say:—

"Before many weeks elapse, the warden will discharge a prisoner of uniformly excellent deportment, and evidently a contrite, well-meaning man, who is just completing a term of ten years' imprisonment for some trifling larcenies committed in a single evening upon one or two scanty clothes-lines and a hen-coop; he will leave behind him an associate who is serving out a term of *fourteen years* for the same offence. These men, for such small thefts, with no especial aggravation, would ordinarily have been punished with a few months in the house of correction of Berkshire county; but on account of a local excitement the forms of law were ingeniously twisted, so as to turn their acts into a State prison offence, which was visited by a penalty more severe than that often inflicted on forgers, highwaymen, and homicides in intent and even in fact.

"There is now in our prison a man serving out a sentence of four years for bigamy. He was an illiterate, ill-informed person, whose wife, without cause, ran away from him, and for years led an abandoned, shameless life in another State. The husband, at length, acting on the assurances of those whose opinions he had long relied upon, and who persuaded him that he was legally absolved from his marital obligations, married. His only sin was ignorance of the law; and for that it was certainly proper that he should suffer to a moderate extent, as an example. But in the same vicinity, since then, a man who in a short space of time, with villainy cool and premeditated, successively married and deserted four respectable young women, with no extenuating circumstances, was sentenced to only eighteen months in the house of correction.

"A striking instance of the injurious inequality of which we speak, was exhibited some months ago, when two criminal terms of the same court were concurrently held in neighboring counties; the cases tried were quite similar, excepting the milder character naturally existing in one of the counties that was almost entirely a rural one. In the latter, the sentences averaged four years in the State prison; while in the county containing four cities and several sea-ports, the average was three months in the house of correction! This disregard of standard and defiance of system results in many embarrassing applications for pardon. It also has a bad influence in many respects upon the subjects of the severer sentences; from at first feeling aggrieved, they become ill-disposed and sullen, resisting all efforts for their improvement and reformation. Minds thus embittered are not infrequent among our convicts."

Surely it would seem to be time that a Commission was appointed to revise the penal code of Massachusetts; and yet, as is well remarked in the Journal of Prison Discipline for April, 1860, page 71,—

"This evil is not peculiar to Massachusetts, nor to any system of discipline. Nor do we see that it is susceptible of legislative remedy. There must be a large discretion lodged in the tribunals of justice; and unless much more time and consideration are given to each offence than seems to be practicable at present, and something like a standard of severity is adopted, the measure of punishment in individual cases will continue to be a matter of chance, if not of caprice, and rogues must count upon this as among the contingencies of their career. We are not prepared to say, that so palpable an inequality exists everywhere as the inspectors charge upon the courts of Massachusetts."

What has been said and quoted will serve to show the difficulties which attend, and must ever continue to attend the lodging of discretionary power in human tribunals; difficulties which enhance the perplexities of settling the questions—by whom shall such discretion be exercised,—and to what extent shall it be allowed. The necessity of such a discretion seems to be conceded; is it likely that the evils which must attend its exercise in similar cases, by different minds, will be increased by limiting it to a certain minimum as well as a certain maximum? The Commissioners have decided this question in the negative, and the Legislature have sustained the decision; and we think it is a correct one. It is well to provide a maximum limit; punishment must have some certainty as to its extent; within a certain bound, at least, the criminal should know what he is to expect as the consequences of his penal actions. A maximum limit may safely be fixed; and if extraordinary cases may at times present themselves in which it might seem desirable to exceed the bounds appointed, yet at least no injustice can be done through the failure of the prescribed law to meet the exigencies of the case. Society may perhaps suffer, but it is through the necessary imperfections of all human legislation. On the contrary, not only the criminal himself may feel that injustice would be done him, in the infliction of an arbitrary minimum penalty; but the very fact of the inexorable and fixed character of that minimum may and will lead, as it undoubtedly has led in many instances to an entire failure of justice. The Commissioners have forcibly put this point:—

"The experienced criminal magistrate knows that the same nominal crimes present almost infinite shades of atrocity. Whilst in some, no extenuating circumstance softens the malignity of the offence, or challenges mercy for the offender, in others the established facts are barely sufficient to constitute the technical crime charged, and the attendant circumstances such as to appeal strongly to the best-regulated sympathies. In such cases it not unfrequently happens that the jury, knowing the extent of a punishment which *must* follow a conviction, and regarding it as greater than the intrinsic turpitude of the offence calls for, acquit a culprit, who, under a different system of punishment, they would have convicted. Even when juries, reasoning on sounder principles, convict such an offender, and the court has imposed the lowest statutory punishment they are authorized to inflict, the Executive is invoked to correct, by his pardon, the excessive severity of such punishment, and yields to the solicitation, not because he does not believe that a crime has been committed, requiring, for the sake of public example, that some punishment should have been inflicted upon the offender, but because, from the inflexibility of the law, the punishment has been disproportioned to the offence." Report, pp. 6, 7.

The distinction between grand and petit larceny, which has long been a feature in our penal code, and had been retained notwithstanding its practical disadvantages had led to its abolishment in England as long ago as 1827, has been entirely abolished by the recommendation of the Commissioners. The just measure of punishment for each particular case has been left, in accordance with the general principle we have noticed above at so much length, to the discretion of the court, limited only by a certain maximum.

The forfeiture of the lands and goods of an offender upon conviction of certain crimes, which has remained upon the statute book, though in fact for a very long period a dead letter, has been rejected by the Commissioners in their revision. If no other reason existed for its abolishment, as an element in punishment for crime, the very fact of its long nonuser is an evidence of its uselessness at least.

While the Commissioners did not regard themselves as invested with authority to interfere with the existing laws regulating prisons or prison discipline, or to make any suggestions as to their amendment, we are pleased to see that they emphatically recognize the important bearing of full and exact criminal statistics. They recommend:—

"A more exact attention to the execution of the provisions of the act of the 27th of February, 1847, entitled "An act requiring the inspectors of prisons, sheriffs,

prothonotaries, and clerks of criminal courts, and others, to make criminal returns to the Secretary of the Commonwealth;" and the act of the 8th of April, 1851, entitled "An act relating to prisons," &c. The proper execution of the first of these acts, will furnish exact means hereafter of judging of the true operation of our criminal laws, and afford useful lights in aid of their future revision; and that of the second will greatly tend to promote the efficacy of those laws, by furnishing the proper means by which the principles upon which they are founded may be duly developed." Report, pp. 9, 10.

Many crimes and misdemeanors which are well known to and punishable by the common law, have been included by the Commissioners in their proposed statutory enactments, with a view to a greater certainty in punishment; and their suggestions have been mostly adopted by the Legislature.

The Report contained a provision for the punishment of the dissuading, hindering or preventing a witness from testifying in a criminal court—an offence punishable at common law; and the Commissioners in their reported enactment, placed witnesses in cases of legislative investigation on the same footing in this respect with witnesses in criminal cases. Report, pp. 13, 63, § 11. The Legislature have very wisely, we think, so far modified the Report, as to extend the punishment to the interference with witnesses in civil courts. Penal Laws, p. 8.

The fourteenth section of Bill No. 1, reported by the Commissioners, has for its object in providing a punishment for the crime of perjury, at the same time "to put at rest the nice distinctions that have been raised, whether perjury can only be committed in a *court of justice*, or in the *course of justice*, or whether a given oath has been taken in a judicial proceeding properly so called or otherwise. These captious objections are removed by defining precisely the kind of oath which, if false, shall constitute perjury." Report, p. 14. The same section, in order to supercede much past, and obviate the necessity of any future legislation on the subject, has extended the crime of perjury to any person who shall be guilty of false swearing in taking any oath required, or that may hereafter be required by any act of assembly.

The Commissioners reported as a proviso to the section as to the crime of libel, a re-enactment of the act of 13th of May, 1856, (Brightly's Purdon, 1184, pl. 1,) allowing the truth of the alleged

libelous matter to be given in evidence. Report, p. 66. The Legislature, however, have stricken out this proviso, (Penal Laws, p. 11,) thus restoring the law on this subject to what it was prior to the act of 1856. It is only necessary to call attention to the fact; since the expediency of such a provision has been very fully discussed and treated, and to review the question in this place, would require a larger space than the particular purpose of the present article will admit.

A more accurate phraseology introduced into section 36, providing the punishment for adultery, will set at rest a question somewhat vexed in criminal courts,—whether an unmarried person could be convicted of this crime. It is to be regretted, we think, that the maximum of punishment for this crime—most heinous in its nature, and productive of great social evils, and in its effects often involving the domestic peace and happiness of entire families—had not been fixed at a higher limit than a fine of five hundred dollars and imprisonment for one year.

Section 44, reported by the Commissioners, and which is a mere re-enactment of the first section of the act of the 15th February, 1808, relative to masquerades and masked balls, has, with very questionable propriety, been stricken out by the Legislature. The immoral and prejudicial tendencies of such entertainments can hardly, we think, be denied. It is true that prosecutions for the offence have been hardly known; but this is owing not so much to such an improvement in the moral sense of society as renders a penal prohibition unnecessary, as to the very inherent nature of such exhibitions rendering, from their necessary publicity, immunity from detection and punishment almost impossible. It will not be many years, unless we are greatly mistaken, before depraved and licentious tastes shall, with exaggerated vigor and license,—finding the statutory prohibition deliberately stricken out,—revive these now almost obsolete entertainments; until their evil results shall force the Legislature to enact even more stringent penal laws against their tolerance.

The heartless exposure of infants of tender years, with intent to their abandonment—a crime which, to the shame of civilized and christianized humanity, the Commissioners feel compelled to

declare is becoming common in large communities—has rendered necessary the introduction of an entirely new section (46) for its repression.

A very important provision for the prevention of carelessness and negligence, as well as wilfully criminal intent, in the sale or disposition of dangerous poisons, and for the protection and security of life and health, is contained in section 71, reported by the Commissioners. The section is as follows:—

"No apothecary, druggist or other person, shall sell or dispose of by retail, any morphia, strychnia, arsenic or corrosive sublimate, except upon the prescription of a physician, or on the personal application of some respectable inhabitant of full age, of the town or place in which such sale shall be made; and in all cases of such sale, the word poison shall be carefully and legibly marked or placed upon the label, package, bottle or other vessel or thing in which such poison is contained; and when sold or disposed of otherwise than under the prescription of a physician, the apothecary, druggist or other person selling or disposing of the same shall note in a register, kept for that purpose, the name and residence of the person to whom such sale was made, the quantity sold, and the date of such sale. Any person offending herein shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding fifty dollars."

Sections 82 to 89, inclusive, reported by the Commissioners, are new, and provide against the actual administration of poison, or actual wounding of another with intent to commit murder; against any *attempt to administer poison*, or to stab, cut, wound, shoot, drown, suffocate or strangle another, with intent to commit murder, although no actual bodily injury is effected; against the maiming, disfiguring and disabling, or doing grievous bodily harm to any person, by the wilful and malicious explosion of gunpowder or other explosive substances; against the explosion, or sending or delivering to, or causing to be taken or received by another, any explosive substance or any other dangerous or noxious thing, or casting or throwing at or upon or otherwise applying to any person any corrosive fluid or other destructive or explosive substance, with intent to burn, maim, disfigure or disable, or to do some grievous bodily harm to another; against the administration of stupifying mixtures with criminal intent; against any criminal attempt to procure the miscarriage of a pregnant woman or the death of the child with which she may be quick; and against the administra-

tion of drugs or application of instruments with intent to produce abortion, causing death, when the woman is not actually pregnant.

The Legislature have stricken out of section 86, as reported by the Commissioners, the provision which made the intent "to injure and destroy the clothing worn by" any person, by means of explosive, destructive or corrosive substances, criminal equally with the intent to do bodily harm. The act, it is true, cannot be regarded as equally heinous in the former case; but the abolition of the minimum punishment afforded every safeguard for the proper graduation of the penalty in proportion to the enormity of the offence. The provision stricken out has not been supplied by the Legislature in any other form, and this omission is to be regretted, as the necessity of some such provision is obvious.

It would seem that section 100, of Bill No. 1, reported by the Commissioners, would more properly have found a place in Bill No. 2, relating to criminal procedure and pleading. The section is intended to meet the case where a party has been indicted for a felonious assault, provided against in previous sections of the act, and the proofs, while they may fail to sufficiently establish the facts required to constitute the felony, are adequate to make out a misdemeanor in an aggravated assault not amounting to a felony. The provision of the section under consideration allows the jury, in such a case, to acquit of a felonious assault, and convict of the misdemeanor. The subject matter of the section comes rather under the head of criminal procedure.

Under Title VII of Bill No. 1, "Offences against Personal Property," many valuable improvements have been suggested by the Commissioners, and for the most part adopted by the Legislature. A systematic arrangement of various kinds of robbery, according to the different aggravating circumstances attending the crime, has been introduced. The subjects of larceny have been set forth in an extended enumeration, so as to embrace choses in action, deeds, receipts, letter books and account books, and many similar articles, for which no conviction could be had for larceny heretofore except as for pieces of paper. The "actual condition of our civilization and commerce" has long required that this standing reproach of our

criminal jurisprudence should be abolished. It is to be regretted, we think, that the Legislature has seen fit to strike out the one hundred and and seventh and one hundred and ninth sections, as reported by the Commissioners under this title. Section 107 made it larceny for a person "to steal any chattel or fixture let to be used by him with any house or lodging;" and section 109 made it a misdemeanor for any person to "steal or pluck up, pick or gather, with intent to steal or carry away, any flax, grass, or grain of any kind;" or to, "in the night time, steal or dig any roots or vegetables, or pull or pick any fruit growing in and upon the ground of another, with intent to steal and carry away the same;" or to "knowingly buy or receive such flax, grass, grain, vegetables or fruit, or any of the articles of property particularized in this or the preceding section." The preceding section (108) makes it larceny to "steal or rip, cut or break, with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to any building whatsoever, or anything made of metal fixed in any land, being private property, or for a fence to any dwelling house, garden or area, or in any square, street or other place, dedicated to public use or ornament." The only way heretofore of punishing the class of offenders provided against by this last section, has been by prosecution for malicious mischief. The growing extent of these evils in cities and large towns, and the heavy injuries and depredations upon property which are their consequence, makes a provision for their more severe and certain punishment highly necessary.

Section 110 is new, and in connection with the provisions of section 29 of Bill No. 2, will afford the means of punishing and repressing a very dangerous class of offences, the punishment of which has been heretofore attended with so much difficulty and doubt, as to greatly deter the injured parties from the attempt to secure any redress. These sections make it larceny in a servant or employee to convert to his own use property received by him for the use of his master or employer, which has never otherwise been in the possession of such master or employer; and make it lawful

in prosecutions for such offences, to charge in the indictment, and proceed against the offender for any distinct acts of embezzlement, not exceeding three, which may have been committed by him against the same master or employer within the space of six months; and provide that in every such indictment, except where the offence shall relate to a chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and that such allegation, so far as regards the description of property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed, shall not be proved, or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him, in order that some part of the value thereof should be returned to the party delivering the same, and such part should have been returned accordingly. (Report pp. 29, 44, 85, 110.) Had a similar enactment been in force some years since, as it ought to have been, for England, and the States of Massachusetts and New York have long since found such a statute necessary, there would not have been the difficulty and embarrassment attending the just conviction and punishment of an offender, which has recently been exhibited in this Commonwealth, when eighteen months intervened between the arrest and the affirmance of the conviction by the Supreme Court, the entire interval being consumed in earnest and warmly-contested efforts to secure the final result,—a result attained at last, only through the vigor of the long-settled principles of the common law applied to an entirely new case. *Commonwealth* v. *Biles*, 8 Casey, 529.

Section 113, making it lawful to punish the receivers of stolen goods, as well before, as after the principal offender shall have been convicted, would have found a more appropriate place in Bill No. 2. It relates to criminal procedure.

To section 114 as reported by the Commissioners, providing for the punishment of obtaining money or goods by false pretence, the Legislature have added an important clause, making the obtaining

"the signature of any person to any written instrument by like pretences" similarly punishable.

Section 132, as reported and adopted, "is new, and provides against the fraudulent and malicious destruction of various securities therein enumerated, as deeds, wills, notes, certificates of stock and the like."

Under Title VIII, "Offences against real property and malicious mischief" have been arranged. The Commissioners, in order to avoid an embarrassment in the proof of the crime of burglary, which frequently occurs in prosecutions for this offence, had introduced a proviso to section 138, "That so far as the same is essential to the offence of burglary, the night shall be considered to commence at nine o'clock in the evening, and to conclude at six o'clock in the morning." (Report pp. 32, 90.) This very wise and judicious proviso, the Legislature have rejected.

Section 142, is intended for the prevention and punishment of the intentional burning of any building for the purpose of defrauding insurance companies; and the Legislature have wisely extended its operation to the like fraudulent burning of any ship, or other vessel.

Section 144, is new, and provides for the offence of unlawfully and maliciously placing or throwing in, into, upon, against or near, any building or vessel, any gunpowder or other explosive mixture, with intent to do bodily harm to any person, or to destroy or damage any building or vessel, or any machinery, working tools, fixtures, goods or chattels. A provision which will be found of great practical use in punishing a very dangerous class of offenders.

To section 152, as reported by the Commissioners, prescribing the punishment for malicious mischief, in injuring or destroying the plants, fences, buildings, or any other part of the public grounds, or grape-vines in vinyards, the Legislature have added a clause extending the provisions of the section, to meet cases of injury or destruction of fruit or ornamental trees or plants in any orchard, garden, close, public street or square. This addition is undoubtedly intended to supply in a measure the deficiency caused by the rejection of section 109, above referred to, which had classed the offence

as carried to the extent it almost invariably is, among the sections relating to larceny, and had provided a severer maximum punishment.

Section 153, provides a certain and very just punishment for malicious mischief, as exercised to the injury of mines, a very necessary protection for the great mining interests of the Commonwealth.

The Commissioners very properly reported a section (157) for the protection of domestic animals against the malice of those, who might seek to exhibit their evil natures in killing, maiming, or disfiguring the live stock of others. The Legislature have increased the maximum punishment reported by the Commissioners from two to three years, augmented its severity by making the imprisonment, "by separate or solitary confinement at labor," and extended the operation of the section to persons who "shall wilfully, or maliciously administer poison to any such beasts, or expose any poisonous substance with intent that the same shall be taken or swallowed by them." Penal Code, p. 40. There is a double malignity in the heart which seeks the gratification of its revengeful, or envious, or hateful feelings against another, by cruelty towards his dumb beasts, which demands a severe punishment. We are glad the Legislature have taken this view of the matter.

Probably to no class of offences, is the term "malicious mischief" more properly applicable, than to those, (we regret to say not unfrequent,) acts of disfiguring or damaging, to an extent oftentimes that amounts to destruction, of works of art, science or literature, or objects of curiosity in libraries, museums, galleries, or cabinets, or statues, monuments, &c. exposed to public view. It is a matter of congratulation that an effective provision has been reported and adopted for the punishment of all such offenders. Report, p. 93, § 158; Penal Code, p. 40, § 155.

Title IX, relating to offences against the coin, and forgery, has been enacted by the Legislature as reported by the Commissioners, without alteration. The first eight sections (159 to 166) are new, and provide a system for the punishment of coining, an offence usually prosecuted in the federal courts, on account of the more

complete and perfect character of the United States statutes on this subject. The case of *Fox* v. *The State of Ohio*, (5 Howard, U. S. R. 410) settled the point that the State jurisdiction may be properly exercised over such crimes. The operations of those who tamper with and counterfeit the coin of the country, are so varied and extensive, that some provision seemed absolutely necessary to insure the punishment of such offenders, without the difficulties and embarrassments of prosecutions before tribunals often remote from the scene of the offence.

Some important provisions are introduced in sections 168, 169, 170, and 171. A clause in section 168 covers forgeries of bank bills or notes by means of photographic plates of any kind. Section 169 is directed against the fraudulently connecting of different parts of several bank notes, or other instruments, in such a manner as to produce one or more additional notes or instruments. Section 170, punishes the offence of the possession of ten or more similar, false, forged, altered, or counterfeited bank bills or notes, known to be such, by the possessor, with intent to utter, pass, or sell the same. Section 171, provides a punishment for fraudulently passing or uttering a note or bill, purporting to be of a bank or association which never had any legal existence, knowing that said bank or association never did legally exist.

Title X, and last of Bill No. 1, contains certain general provisions, necessary to the completeness of the bill as a whole. These forbid capital punishment, except for murder in the first degree; direct that every offence, not specially provided for by this act, shall be punished as heretofore; direct that restitution shall be awarded as part of the punishment in all convictions for robbery, burglary, larceny, or fraudulent obtaining of goods or chattels, or receiving the same knowing them to be stolen, or uttering or passing any forged or counterfeited coin, bank note, check or writing, or obtaining goods by false pretences, and all similar offences; provide for the punishment of accessories, not otherwise provided for by the bill; direct that acts of assembly shall be strictly pursued, and forbid a resort to the common law, in cases provided for by said acts, further than shall be necessary to carry them into effect; and ex-

plain the general terms "any one, any person," and the like, and the relative pronoun "he," wherever used in the bill, if the contrary be not expressed, as extending to more persons than one, and to females as well as males. There are two sections of this title which deserve special notice. Section 185 provides a maximum punishment, not exceeding double the term of imprisonment at labor prescribed by the bill, for each offence respectively, in cases of second convictions for a similar offence, other than murder in the second degree, where the punishment prescibed for the first offence is separate or solitary confinement at labor. Section 184 removes the disability of witnesses who have been convicted of felonies not punishable with death, or misdemeanors punishable with imprisonment at labor, and who have or shall endure the punishment to which they have been sentenced; excepting, however, from its operation persons convicted of wilful and corrupt perjury.

The second Bill reported by the Commissioners, shows the same care, practical wisdom, and judicious amendment and improvement, in respect to the subjects of penal procedure and pleading, as Bill No. 1 displays in regard to its appropriate subject-matter.

The power of compromising or settling criminal actions, where the injury complained of is likewise the subject of a civil action, and the individual injured has received satisfaction, and has no wish to further prosecute the criminal charge, has been extended by the Commissioners, so as to include not only cases of assault and battery, as heretofore, but such other misdemeanors as are not charged to have been done with intent to commit a felony, or are not infamous crimes. Undoubtedly many prosecutions,—as, for instance to mention but one class of offences, for obtaining goods or money under false pretences,—are instituted in the hope of a recovery of the loss. We do not see that the demands of public justice require, where the party injured acknowledges himself satisfied in cases like these, the further prosecution of the criminal charge. Society will be equally well protected. The same end which has heretofore very frequently been accomplished by a variety of methods not in strict accordance with the requirements of law, may now be reached in a perfectly legitimate mode. Report, pp. 40, 106.

Under Title II., "Indictments and Pleadings," the Commissioners have introduced several very important amendments and reforms. The system of criminal pleading hitherto in practice, in a great measure owed many of its most objectionable features to the stringency of the provisions of the common law, which had fettered and embarrassed the defence of an accused party to a degree that led to the requirement of a strictness and accuracy in the criminal pleader, a failure in which often led to the escape of notorious criminals. But while these provisions had long since disappeared, so that the accused was allowed every opportunity and advantage for a full and fair defence, the old technical rules of pleading still remained in full force. The report of the Commissioners on this topic, and their proposed enactments, which have been adopted by the Legislature without alteration, place the whole subject upon a basis in accordance with the enlightenment of the times, and the dictates of common sense. The accused is put to his election at the outset of his trial, to object to the form or manner in which the alleged offence is charged, or to take issue on the merits of the charge. Formal defects in the indictment may be amended forthwith under the direction of the court, and the trial proceeded with, without the delays consequent on drawing a new bill, and submitting it to the action of the grand jury. The nicety in criminal pleading which rendered the variation of a single letter or figure in the writing or instrument offered in proof, from that set out in the indictment, in prosecutions for forgery, selling lottery tickets, libel and the like, is entirely swept away, never probably again to be heard of except as a curiosity in legal history. So too, any variance between the names of persons aggrieved, and places described in the indictment, and the proofs thereof on the trial, can either be amended on the trial, on objection made, or if not objected to, are considered as waived. "The fourteenth and fifteenth sections of the bill, avoid the heretofore existing necessity of setting forth, in indictments, the names of numerous individuals, owners of property feloniously or fraudulently taken, or maliciously injured or destroyed. They will serve to reduce the voluminousness of such indictments, and can do no possible injury to the defendant, who cannot be interested in the

fact whether one person is, or one hundred persons are the owners of property in regard to which he is charged with having committed a felony or misdemeanor." These sections allow the ownership to be alleged in the indictment as in A B, or A B and C D, and others, joint owners or partners with him or them. Sections 17 and 18 render it sufficient in setting out any instrument in an indictment, to set it out by such description as shall clearly identify it, without putting the pleader to the hazard of setting it out in exact words and figures, at the risk of committing a fatal in a mere clerical error. The nineteenth section provides that a general allegation of an intent to defraud shall be sufficient, without specifying any particular person as the object of the fraud. The gist of the offence is the intent to defraud; if that is proved, it is wholly immaterial to the real issue, whether the intended fraud is against A or B.

Section 20 introduces a very great change in the form of indictments for murder or manslaughter. At common law, it is essentially necessary to set forth particularly the manner of killing, and the means by which it was effected; and a variance in the proof from the manner and means alleged, is fatal. The embarrassments which have arisen from this source are exemplified in the cases of *Rex* v. *Kelly*, 1 Moody C. C. R. 113; *Rex* v. *Martin*, 5 C. & P. 128; and *Rex* v. *Hughes*, ibid. 126, cited by the Commissioners. The courts have somewhat relaxed the extreme strictness of the rule by holding that when the instrument laid in the indictment, and the instrument proved, are of the same nature, as a dagger, knife, sword, spear, or the like; or where one kind of poison is laid, and another kind proved, the indictment will be supported. "The section under consideration goes a step in advance of this doctrine, by declaring that it shall hereafter be sufficient, in an indictment for murder, to charge that the defendant did feloniously, willfully, and of his malice aforethought, kill and murder the deceased, without going into the details of the cause and manner of the death, which the cases cited show only tends to create unnecessary difficulties on the trial, and often results in the complete defeat of justice."

Sections 21 and 22, simplify very much the forms of indict-

ments for perjury and subornation of perjury, and relieve the criminal pleader of the necessity at present existing of much voluminousness and technicality, in setting forth these offences. They render it unnecessary to set forth the information, indictment, declaration, or part of any record or proceedings, or the commission, or authority of the court, or person or body before whom the perjury was committed, or was agreed or promised to be committed, further than is sufficient to set forth the substance of the offence charged.

The 25th section introduces an important reform by permitting, in every indictment for feloniously stealing property, in whatever form the offence may be charged, a count to be added for feloniously receiving said property, knowing it to have been stolen, and *vice versa;* and by rendering it lawful for the jury trying the same, to find a verdict of guilty, either of stealing the property, or of receiving the same, knowing it to have been stolen; and in cases where the indictment is preferred and found against two or more persons, to find all, or any of said persons, guilty of either stealing the property, or of receiving it knowing it to have been stolen, or to find one or more of said persons guilty of the stealing, and the other, or others, guilty of the receiving.

Section 26, dispenses with certain useless and cumbersome forms in the arraignment and trial of prisoners, which have been in use in some of our courts, adopted from the ancient common law practice.

The Commissioners reported (pp. 45, 113) certain changes in the existing laws respecting challenges of jurors; reducing the number of peremptory challenges allowed to the accused in prosecutions for felony, from thirty-five to twenty, and allowing the Commonwealth four peremptory challenges in certain minor felonies, instead of withholding altogether the privilege of peremptory challenge on her part in felonies. The reasons assigned by the Commissioners for thus extending the right of peremptory challenge on the part of the Commonwealth, are as follows:—

"By the present code, a large number of offences, which were misdemeanors at common law, are now made felonies. Hence, the excluding of the Commonwealth

from the right of challenge in any felony, is almost totally to deprive her of the right of challenge. In the practical administration of criminal justice, the right of the Commonwealth to challenge four jurors peremptorily, is of the deepest importance. It is not an uncommon thing to find in a panel of jurors, one or more persons pledged to the defendant by personal or social sympathies, or influenced in his favor by worse motives. The right to peremptorily challenge four jurors, is the security of the public against such contingencies." Report pp. 45, 113.

The Legislature have appreciated and acknowledged the full force of these reasons, and given that force its proper expression, by extending the right of the Commonwealth to four peremptory challenges, to all felonies, without any exception. Penal Code, p. 61, § 38.

Section 40, assigns to the court the authority of determining upon the truth and sufficiency of challenges for cause.

The forty-first "section is new, and is introduced to settle a question in criminal practice, which has produced difficulty. At common law, upon a joint trial, each prisoner may challenge his full number, and every juror challenged as to one, is withdrawn from the panel as to all the prisoners on trial, and thus, in effect, the prisoners in such a case possess the power of peremptory challenge to the aggregate of the numbers to which they are respectively entitled. The embarrassments from defect of jurors, resulting from the exercise of this right by numerous defendants jointly indicted, led the courts, at a very early period, to determine that they had the power, against the will of the prisoners, to sever the panel, and try them severally, if they insisted upon their right of several challenges. This settled the question, that prisoners, jointly indicted, could, against their wishes be tried separately. But whether prisoners, jointly indicted, could *demand* a separate trial presented another question. Some insisting that they possess such a right; others contending that such severance is a matter of sound discretion, to be exercised by the court, with that due regard and tenderness to prisoners, which characterizes our criminal jurisprudence. And this latter we regard as the better opinion. In the section under consideration this doctrine has been adopted, except as to cases of joint indictments for felonious homicide, in which it is proposed to give the accused the positive right to demand separate trials. In cases of joint trials, it is also proposed to limit the number of the challenges of all the prisoners, to the number each would be entitled to, if separately tried, and no more. As prisoners jointly indicted for felonious homicide have, by this section, the right to sever in their trials, persons so circumstanced will not be affected by this latter provision, in cases of joint trial, as their being so tried, is a matter resting entirely in their own choice." Report, pp. 45, 46.

It would have been, we think, more just to the accused, and at the same time avoided the embarrassments justly complained of by

the Commissioners, to have limited the peremptory challenges in joint trials to double the number each would have been entitled to if separately tried. In cases of extended conspiracy, for instance, even this limit might seem too restricted.

Section 45 introduces a new principle in making "the accessory before the fact guilty of a substantive offence, and subjects him to punishment for his crime, without postponing it until the conviction of the actual perpetrator. Or, more precisely speaking, abolishes in felonies the technical distinction now existing between accessories before the fact, and principal offenders." Report, p. 47. Section 46 consolidates and extends the existing laws respecting accessories after the fact, and with section 45 reduces the whole law as to both classes of accessories to a consistent harmony.

Provision has been made in sections 47 and 48, to obviate the difficulties which not unfrequently arise where a person has died in one county from the effects of an injury received in another county, or died out of the State from the effects of a wound, or other cause of death received in the State; and in sections 49 and 50, to remove embarrassments which attend the laying of the *locus in quo*, where a crime has been committed so near county lines as to render it doubtful in which of two counties it has been actually perpetrated, or where a crime has been committed during journeys or voyages by land or water, in carriages or vessels of any kind, which have passed through various counties in the journey or voyage during which the crime has been committed.

By sections 51 and 52, which are both new, the technical difficulties are obviated which rendered an acquittal necessary where the indictment charged a felony, and the proofs amounted to only an attempt to commit a crime; and *vice versa*, where the indictment charged an attempt, and the proofs showed that the felony was actually committed.

A fundamental change in the general law of evidence was proposed by the Commissioners, in removing the incompetency of any witness who had been convicted of an infamous crime, except wilful perjury, with a proviso that the conviction might be given in evi-

dence to attack his credibility. Report, pp. 50, 51, 116. The Legislature, however, have refused to incorporate this provision in their enactment. It is to be regretted, we think, that this advance in the laws of evidence has not been adopted.

The existing laws relating to the limitation of criminal prosecutions, have been extended so as to affix a period of limitation to all prosecutions, except murder and voluntary manslaughter. Report, pp. 55, 123. The repealing section, instead of being framed in the general words sometimes adopted, has been particularized, each act and part of an act repealed being specified by its title and date. The former method of proceeding "certainly gives ease and facility to the law maker, but is the source of continued embarrassment to the judiciary, which is not only required to construe the law actually enacted, but to compare it with others supposed to be repealed, in order to ascertain whether such is actually the fact. The Commissioners are aware that such an absolute repeal of the existing laws is a work of great delicacy, and one requiring extreme care and caution. They have spared neither time nor labor in making this section correct, and believe it to be so. Although covering the criminal legislation of Pennsylvania, almost from the organization of her civil government, it is still believed to be accurate." Report, p. 56.

The Commissioners did not think any change was required in the mode of selecting and summoning jurors in criminal cases.

The report, as a whole, is a most masterly production, and reflects infinite credit upon the ability, learning, industry, and faithfulness of the Commissioners; and will prove an enduring monument to their fame. It is deserving of careful study in all its details, not only by all who are engaged in the practice of criminal law, but by the legislator, and by all who are interested in penal legislation, and the entire subject of crimes and punishments. Pennsylvania may now congratulate herself on possessing a system of penal laws worthy of her advanced civilization, and adapted to the wants of her extended and varied population.